

NOT INCLUDED IN
BOUND VOLUMES

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAVE AND BUSTERS MANAGEMENT

CORPORATION, INC.

and

Case 19-CA-181845

MAKENNA BANKS

ORDER DENYING MOTION

This matter comes before the National Labor Relations Board upon the joint motion by the parties to waive a hearing and decision by an administrative law judge and to transfer the proceedings to the Board for a decision based on the stipulated record. For the reasons that follow, the Board has decided to deny the joint motion.

On December 16, 2016, the General Counsel, through the Regional Director for Region 19, issued a complaint and notice of hearing alleging that the Respondent has been violating Section 8(a)(1) of the National Labor Relations Act by maintaining, on a nationwide basis, a Mutual Arbitration Agreement it requires employees to sign as a condition of employment, providing that all claims and disputes arising out of the employees' employment and/or termination shall be resolved through arbitration. Separately, the complaint also alleges that the arbitration agreement violates Section 8(a)(1) of the Act because it may lead employees to reasonably believe that they are prohibited from filing charges with the Board and includes a confidentiality provision that restricts employees' ability to discuss terms and conditions of employment. On August 17, 2017, the parties filed their joint motion with the Board and requested that the Board set a time for the filing of briefs.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S. Ct. at 1619, 1632.

The Board having considered the matter,

IT IS ORDERED that the Joint Motion is denied, without prejudice, in light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014).

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 19 for further processing consistent with *Epic Systems*.¹

Dated, Washington, D.C. October 3, 2018.

By Direction of the Board:

/s/ Farah Z. Qureshi

Associate Executive Secretary

¹ *Epic Systems* did not affect the separate complaint issue whether the Respondent’s arbitration agreement unlawfully restricts employee access to the Board or the discussion of terms and conditions of employment. But see *The Boeing Company*, 365 NLRB No. 154 (2017). Having denied the joint motion in this proceeding, the Board expresses no opinion with respect to this issue at this time.